United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1593

To be argued by
HERBERT LYON, Esq.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1593

UNITED STATES OF AMERICA,
Respondent,

—against—

JULIUS SCHURKMAN,
Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

-against-

JULIUS SCHURKMAN,

Defendant-Appellant.

----------X

PRELIMINARY STATEMENT

JULIUS SCHURKMAN appeals from a Judgment of Conviction of the United States District Court for the Southern District of New York (Conner, J.) entered December 14, 1976, which Judgment convicted appellant, after a jury trial, of offering a bribe to a public official in violation of Title 18, United States Code, Section 201(b).

On December 14, 1976, Judge Conner sentenced appellant to imprisonment for three months and fifteen months probation.

QUESTIONS PRESENTED

1. Did the Trial Court commit reversible error in its overt suggestion to the jury in its supplemental

charge that the appellant did not take the stand and offer testimony on his own behalf because he was guilty?

2. Did the prosecutor, during summation, commit reversible error by drawing the attention of the jury to the possible future criminal conduct of the defendant?

3. Did the Trial Court commit reversible error in allowing into evidence over objection hearsay testimony relative to a subsequent bribe payment by JAMES TAYLOR to Revenue Agent GUBENKO?

4. Was the combination of errors at trial harmless?

STATEMENT OF THE CASE

The government's case against JULIUS SCHURKMAN, an accountant, arose out of an Internal Revenue Service audit of the JTR Trucking Company and the suspicions of the revenue agent in charge of the case, one STEWART GUBENKO. JTR Trucking was a client of Mr. Schurkman's.

As he commenced his review of the books of JTR, Gubenko voiced his concern to Schurkman over a large unsubstantiated petty cash loan; cash disbursements to Mrs. Ruth Taylor, wife of the sole owner of JTR, James Taylor; cash disbursements to Agrecland Corp. (a corporation wholly owned by Taylor), and the high interest income Taylor was picking up on his individual return. In order to be satisfied with his audit, Gubenko began to pressure Schurkman for substantiation of these items. (27, 30-32)

On January 27, 1976, after a morning review of the books at JTR, Schurkman and Gubenko had lunch at Ponte's Restaruant in Manhattan. Schurkman, according to Gubenko, suggested to Gubenko that the problem of substantiation "Could be worked out." (33)

This highly equivocal phrase, which is commonly used in the field of accounting in terms of possible adjustments to a disputed audit (88) triggered in Gubenko's mind the idea that a bribe was in the offing

Gubenko was relatively inexperienced (he had been a revenue agent for only three years). He had taken a "Bribery Awareness Course" where he developed a subjective frame of reference, where the term "could be worked out" was viewed as hinting at a bribe, rather than a term of compromise. (93)

Anxious to follow up on the "bribe offer", Gubenko the very next morning went to the Inspection Service of the Internal Revenue Service and reported that in his "opinion" a solicitation was made. (34) Gubenko conceded however that he had no prior experience in such matters. (93) As a result of his report, the inspection service decided to record all future telephone calls between Schurkman and Gubenko. A meeting was arranged between the two for February 5, 1976. (34)

This meeting of February 5, 1976 was the crucial meeting of the case. It was at this meeting that Schurkman allegedly made a bribe offer, and set the wheels in motion for all future events. What is significant is the fact that while all subsequent meetings and calls between Schurkman and Gubenko were recorded, the government claimed this crucial conversation was <u>not</u> recorded. Gubenko's version of the meeting is as follows.

Gubenko claimed that in response to his "continued pressuring" of Schurkman for substantiation, Schurkman wrote on a piece of paper which was handed to him by Gubenko "3 U.S. 7 me and you, 1/3 me, 2/3 you." Gubenko alleged that Schurkman told him that this meant $3,000 to the U.S. on government stationery, with $7,000 to be split between Gubenko and Schurkman, 2/3 and 1/3 respectively (38).*/

All subsequent events are a by-product of this meeting. Whether Gubenko was over-reaching in his approach to Schurkman and was over-anxious to "trap" Schurkman is a question which could only be answered by either Gubenko or Schurkman. Schurkman, however, did not testify.

James Taylor testified that on the morning of February 5, 1976, Schurkman informed him that he owed a large amount in taxes. Gubenko stated, in response to an inquiry from Taylor that morning, whether there will be much more to go with the tax, "Everything will be all right, I don't think it will be too much more, so you will be all right." (174)

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*/ After completion of this meeting, Gubenko went to the Inspection Service and swore out an affidavit of events.

After the February 5th lunch, Schurkman allegedly informed Taylor that he owed a substantial sum in taxes and that it would cost $15,000 to square it. Taylor became very excited over this fact because he didn't understand how it could be possible. (175-76)

Taylor subsequently told Schurkman the only way in which he would pay $15,000 was if he could have a piece of paper showing an amount of money he owed the government. Schurkman allegedly told him that of the $15,000, $10,000 or $12,000 would go to the agent and $2,000 or $3,000 would go for the tax. Taylor claimed that Schurkman told him he had to do it this way in order to prevent him from going to jail. (180-181)

On February 10, 1976, Gubenko called Schurkman's office and in a recorded conversation left the message for him "Let's talk" (44). This was supposedly a pre-arranged signal to Schurkman that Gubenko was "interested". (41) When Gubenko reported the February 5th meeting to the inspection service, no reference was made to the fact that Gubenko, when calling Schurkman's office, if interested, was to leave the message "Let's talk". Gubenko subsequently amended his affidavit to include this fact, only <u>after</u> he called Schurkman's office. This, in

spite of the fact that Gubenko considered the entire conversation of the bribe offer going beyond the earlier solicitation. (118-120)

On February 24, 1976, Gubenko was fitted with a tape recorder and transmitter by the Inspection Service. He then went to meet Schurkman in Bronx County. (45)

In a restaurant, over coffee, Schurkman handed Gubenko a paper which allegedly stated that Schurkman had discussed the matter with Taylor and told him he had no other choice but to agree to the demands and if Taylor did not, Schurkman would no longer represent him. Schurkman stated that Taylor wanted a piece of paper, signed by Gubenko, stating the amount owed to the government. Only if Taylor had such a paper would he deliver the money to either Gubenko or Schurkman. (47-48)

Gubenko told Schurkman that he could not go along with Taylor's request because it could not be done that way and he didn't "want to get screwed". (Govt. Ex. 2A, 128)

On February 25, 1976, in a recorded statement, Gubenko called Schurkman and pressed him as to whether Taylor had yet agreed. Schurkman stated he needed time

to discuss it with Taylor; Gubenko indicated the deadline would have to be the next day, Thursday. Taylor, however, maintained his position that he would not pay any money until he received a statement. Schurkman repeated it could not be done that way, that Gubenko could not transact a deal that way and informed Taylor that he would no longer represent him. (Govt. Ex. 3A, T61)

On February 26th, Gubenko again called Schurkman and Schurkman told Gubenko he felt that Taylor would not go along with the plan. He asked for another date to make sure it was definite. (Govt. Ex. 4A, 64).

On February 27, 1976, Gubenko once again called Schurkman. Schurkman stated that Taylor would not go along and as far as he was concerned, the case was closed.

Taylor nevertheless approached Gubenko on his own to "know the outcome of his tax liability". (T68) On March 3, 1976, Taylor handed the sum of $2,000 to Gubenko and thereafter Taylor was placed under arrest and charged with the crime of bribery.

Taylor admitted, he pled guilty to bribing an IRS Agent prior to his testifying against Schurkman. He stated that if he cooperated with the Government, this fact would be mentioned to the sentencing judge. (170) In fact, Taylor received a suspended sentence and a $1,500 fine. Schurkman received a jail sentence of three months and a period of probation of fifteen months.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS OVERT SUGGESTION TO THE JURY IN ITS SUPPLEMENTAL CHARGE THAT THE APPELLANT DID NOT TAKE THE STAND AND OFFER TESTIMONY ON HIS OWN BEHALF BECAUSE HE WAS GUILTY.

The Court initially, in its main charge, instructed the jury that:

> "The defendant is presumed to be innocent until the government has proven him guilty beyond a reasonable doubt. That presumption of innocence existed when the indictment was brought, it existed throughout the trial, and it will continue during your deliberations in the jury room.
>
> The defendant having that presumption of innocence, does not have to prove anything. He is entitled to remain absolutely silent and to leave with the government its burden of proof beyond a reasonable doubt.
>
> The defendant cannot be required to give evidence against himself. He is entitled to remain silent. The Constitution gives him that privilege.

And the privilege would be worthless if because he chose to remain silent you could presume that he must be guilty or that he has something to hide.

He is entitled to remain silent. In this case he elected to do so. But you cannot take the fact that he elected to avail himself of that constitutional right as evidence against him."

Then defense counsel, Jacob Lefkowitz, took exception to this portion of the charge. (318) The charge went beyond the plain meaning of the 5th Amendment protections and thereby suggested to the jury that the appellant did not testify because he "had something to hide."

Defense counsel then asked the Court to charge, in line with appellant's Request to Charge, number 3, very simply that the "law never imposes upon the defendant in a criminal case the burden or duty of calling any witness or producing any evidence. Holland v United States, 348 U.S. 121." Defense counsel was emphatic in his request that "that's all" he wanted the Court to charge to the

jury. (319)

The Court, in its attempt to "clarify" its main charge compounded its original error and left the jury with the indelible impression that the appellant did not testify because he had something to hide.

At first the court reminded the jury of its instructions from the main charge:

> "In my charge I reminded you of the constitutional privilege which every defendant has not to give testimony against himself. That is the wording of the Fifth Amendment to the Constitution."

The Court then added:

> "I don't mean to suggest that if defense did testify his testimony would be against him. Obviously, if he were going to give testimony against himself he wouldn't testify." (Emphasis added)

It is precisely this suggestion, that the appellant did not testify because his testimony would have been incriminating, that the Fifth Amendment

condemns. United States v Schabert, 362 F2d 369 (2d Cir. 1969); Wilson v United States, 149 U.S. 60 (1893); Griffin v California, 380 U.S. 609 (1965); People v Fitzgerald, 156 N.Y. 253 (1898).

The Court then went on to hammer the point home with the following instruction:

> "He could just as well give testimony for himself, but he is not required to do that, and referring to that privilege in the wording of the Constitution, I do not mean to suggest to you that if he had testified it would be against himself. As I told you, that privilege of remaining silent and of not testifying is a very important privilege and its value would be totally destroyed if you could assume that because a defendant had not chosen to testify or call any other witness that he has no evidence he could adduce and that he must be guilty.
>
> So don't attach any importance at all to the fact that in this case the defendant did not elect to take the stand or call any other witnesses. He

has chosen that constitutional
privilege and in this case he chose
to avail himself of it as he was
entitled to do."

The Court's instruction is a classic example of a judge over-emphasizing the issue of the defendant's failure to testify, confounding and confusing the jury, causing serious error and severely hampering the appellant's right to a fair trial. It is the "impression" left with the jury that is the touchstone in determining prejudicial harm to an appellant. United States v Schabert, supra; Wilson v United States, supra; Griffin v California, supra; United States v Ward, 168 F2d 226 (3rd Cir. 1948).

Although the Court at times stated it "didn't mean to suggest" that if the defendant did not testify his tesimony would be against him, the suggestion nevertheless was clearly conveyed and firmly planted with the jury. The Court stated what it believed to be the obvious, that "if he were going to give testimony against himself he wouldn't testify." This remark portrays appellant's silence as evidence of guilt in face of the government's accusations. The effect of such a charge is to have the Court solemnize the silence of the accused into evidence against him. The casting of the

privilege in this manner severely undermines the presumption of innocence and in a criminal trial, shifts the burden of proof to the defendant.

The appellant, as all criminal defendants, had a constitutional right to rely upon the presumption of innocence and the right to remain silent against the accusations of the government. This right was violated by the Court impressing on the minds of the jury that the appellant didn't testify because he had something to hide. The fact that the accused does not testify in his own behalf cannot be permitted to create any presumption against him. That is the plain mandate of the Fifth Amendment. The force of that Amendment should not be weakened and destroyed with the jury by qualifying words. It is not necessary to add anything to the plain and simple meaning of the Fifth Amendment protection.

The hallmark of our system of justice is that each defendant is presumed to be innocent, that he has — a right to stand mute in the face of the accusations against him. The burden of proof rests with the government. As the Court noted in Murphy v Waterfront Commission, 378 U.S. 52, 55 (1964), the Fifth Amendment reflects:

"Many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, ...'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,'...., our distrust of self-deprectory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty', is often 'a protection to the innocent.'" Murphy v Waterfront Comm., 378 U.S. 52, 55 (1964).

The Court's charge in this case clearly violated the appellant's Fifth Amendment rights.

It was unmistakably suggested to the jury that the appellant did not testify because he "had something to hide." They were instructed that: "Obviously, if he were going to give testimony against himself, he wouldn't testify," and that "He could just as well give testimony for himself,but he is not required to do that." It is of little import that some of these suggestions were made in the "negative" for the impression given was unmistakeable - the appellant was hiding behind the Fifth Amendment and that, of course, he didn't testify because he was guilty. The thrust of the court's charge was nakedly transparent.

The Supreme Court, as early as 1893, in the leading case of Wilson v United States, 149 U.S. 60, squarely cautioned both prosecutors and courts alike about improper comments on the Fifth Amendment. In Wilson, the Supreme Court in reversing the defendant's conviction, chastised the trial court for leaving the jury with the impression that they:

> "...know full well that an innocent would have gone on the stand, and have testified to his innocence,"...

The Court went on to note that by:

> "this action of the court in refusing to condemn the language of the district

> attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that, if he were an innocent man, he would have gone on the stand as the district attorney stated he himself would have done." (149 U.S. at 163)

The error warned against by the Supreme Court in Wilson is exactly what happened in the instant case.

The language of the court's charge in the case at bar was a clear misstatement of the law. The error here is not mere inaccuracy, but one "affecting substantial rights" and the omission of counsel to note it does not relieve this court of its responsibility to do so. Rule 52, 18 U.S.C.A. Federal Rules of Criminal Procedure. United States v Ward, 168 F2d 226 (3rd Cir. 1948). It might well be that defense counsel was fearful to make any objection since it was his objection to the original charge that brought forth the new, more damaging charge.

We take note of the approach of Mr. Justice Frankfurter in Ullmann v United States, 350 U.S. 422 (1956), in explicitly defining the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. The constitutional protection must not be interpreted in a hostile or niggardly spirit. Justice Frankfurter stated that:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying states. The founders of the nation were not naive or disregardful of the interests of justice."

The command of the Fifth Amendment that "Nor shall any person . . . be compelled in any criminal case to be a witness against himself . . ." registers an important advance in the development of our liberty. It has been called "One of the greatest landmarks in

man's struggle to make himself civilized." Griswald, The Fifth Amendment Today (1955). Here, appellant's Fifth Amendment privilege was effectively vitiated by the Court's charge which deprived appellant of a fair trial, which he is guaranteed under the laws and the Constitution of the United States.

POINT II

THE PROSECUTOR, DURING SUMMATION, COMMITTED REVERSIBLE ERROR BY DRAWING THE ATTENTION OF THE JURY TO THE POSSIBLE FUTURE CRIMINAL CONDUCT OF THE DEFENDANT.

At the conclusion of his summation, the prosecutor overstepped the bonds of permissible comment and argued to the jury:

> "Ladies and gentlemen, to have an efficient and effective government, we can't afford to have public officials deflected from their duties in this manner.
>
> Ladies and gentlemen, in this regard, I want to leave you with one last thought as to your obligations as jurors: Mr. Schurkman is an accountant. He is a professional and performs a public function. If he is found not guilty by your verdict, he is free to resume his activities, he is free to go about, ruin the lives of other clients, he is free to go about trying to corrupt other public officials, just as he tried to corrupt Mr. Gubenko.

Ladies and gentlemen, the public deserves protection against the corrupting activities of the likes of a Julius Schurkman and I ask you in your verdict to afford the public that protection." (Trial Transcript, p. 266)

The proposition that a prosecutor in summation must avoid remarks which are calculated to inflame the minds of the jurors, is fundamental.

This court in United States v Bugros, 304 F2d 177 (2nd Cir. 1962) in reversing a defendant's conviction, framed the prosecutor's duty in the following fashion:

"It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case. . . The unfair, unwarranted and reprehensible summation deprived the defendant of a fair trial which is his right regardless of how clear his guilt may seem or how strong the proof against

him." (304 F2d at 179).

The possible future criminal conduct of an accused is an area which cannot be alluded to in summation. In United States v Sprengel, 103 F2d 876 (3rd Cir. 1939), the Court of Appeals found error in the closing remarks of the prosecutor which summoned the jurors' attention to the "defiant attitude" of the defendants and the future frauds they may perpetrate if acquitted. Finding these statements beyond the field of fair comment allowed a prosecutor, the court ruled, in reversing appellant's conviction:

> "These comments concerning what might constitute the future conduct of the appellants were prejudicial. The appellants were on trial for crimes which they committed, not for a future course of conduct."
> (103 F2d at 884)

The prosecutor's remarks were highly prejudicial because they, in effect, asked the jury to find Julius Schurkman guilty because he was an accountant, because his profession placed him in a position to conceivably wrongly influence others in the future, because government efficiency may be impaired by such acts and not on

the evidence before the jury. This comment was made merely to invite the jury to consider Julius Schurkman a "bad person" and therefore find him guilty. Such a tactic is not justified by the evidence and is highly prejudicial to the defendant. See, Robinson v United States, 32 F2d 505, 508 (8th Cir. 1928).

Speculation about the future conduct of a defendant denies the accused the right to a fair trial and erroneously invites the jury to participate in the sentencing function. A Jury may not convict an accused for the wrong reason because of the same considerations which require reversal of a finding of guilt based on incompetent evidence or an erroneous charge. The jury's responsibility is to find guilt beyond a reasonable doubt based on the evidence properly before it. The prosecutor's remarks injected an erroneous issue into the jury's deliberation - that of Julius Schurkman's character and propensities. It is now impossible to tell whether the guilty verdict was based on the lawful evidence before the jury or on the impermissible grounds urged by the prosecutor. When a jury is faced with such a dichotomy, one sufficient and the other deficient, it is fatal to a fair trial and a lawful conviction. See, Turk v United States, 20 F2d 129 (8th Cir. 1927). A jury finding cannot

be based on conjecture. United States v Schwartz, 325 F2d 355 (3rd Cir. 1963).

A prejudicial dwelling on a defendant's character and propensities necessarily involves the jury in the sentencing function because it urges the jury to convict for the protection of society. As the Ninth Circuit observed in Evalt v United States, 359 F2d 534 (1966):

> "In cases such as this, where the jury has nothing to do with fixing the penalty, the jury's sole concern is guilt or innocence. It should not concern itself with what punishment the defendant may receive, or whether, if acquitted, he would or would not 'walk out of this courtroom a free man' or whether they would 'turn this man loose again on society.'"
> (359 F2d at 546).

The prosecutor's remark was clearly prejudicial and when coupled with the erroneous instruction given by the trial judge as to the defendant's right not to testify, the jury was left with the impression that Julius Schurkman was a corrupt man, with something to hide, thereby undermining the presumption of innocence owed to the defendant and wrongfully shifting the burden of

proof to the defendant to prove his innocence. As Judge Lumbard, recently noted in a concurring opinion in Martin v Merola, 532 F2d 191, 196 (2nd Cir. 1976):

> "It is defendants' constitutional right to have the prosecutor refrain from making any statements not relating to the indictment or arrest which might prejudice their obtaining a fair trial". */

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*/ Although defense counsel did not object to the prosecutor's remarks, the error nonetheless was fundamental (Rule 52, Federal Rules Criminal Procedure).

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE, OVER OBJECTION, HEARSAY TESTIMONY RELATIVE TO A SUBSEQUENT BRIBE PAYMENT BY JAMES TAYLOR TO REVENUE AGENT GUBENKO.

Both in direct examinations of Agent Gubenko and James Taylor, testimony was elicited that after Julius Schurkman no longer represented Taylor and JTR Trucking, Taylor himself transacted a bribe with Gubenko for the purpose of settling the tax he owed. This testimony was admitted by the court, not for the truth of the testimony or that the bribe had anything to do with the defendant, Julius Schurkman, but for the consideration the jury "might want to give in determining what the conversations between the witness and the defendant meant." (74)

This was a serious and prejudicial error which distracted the jury's attention from the issue of Schurkman's guilt and enmeshed Schurkman's acts in an actual bribe of Gubenko, a crime with which he was not charged. Furthermore, there was no conspiracy count in the indictment to support the admission of such evidence.

Although the doctrine of joint criminal venture allows the admissibility of statements of a co-defendant

made in furtherance of a joint criminal act without the requirement of a conspiracy count in the indictment. United States v Torres, 519 F2d 723 (2nd Cir. 1975); United States v Projansky, 465 F2d 123 (2nd Cir. 1972), the statements in issue took place after Schurkman's involvement with Taylor and Gubenko and had no relevance under the theory of the court.

Declarations and acts after the termination of a conspiracy or joint venture are not admissible under the conspiracy exception to the hearsay rule. Krulewitch v United States, 336 U.S. 440, 69 S.Ct. 716 (1949); Won Son v United States, 341 U.S. 471 83 S. Ct. 407 (1963); United States v Soblen, 301 F2d 236 (2nd Cir. 1962). Acts which take place after a conspiracy or joint venture ends are admissible but only to prove the conspiracy and to prove the declarant's participation therein. Taylor, the declarant, was not on trial.

The record is clear that Julius Schurkman withdrew from any criminal involvement with either Stewart Gubenko or James Taylor prior to the time Taylor himself contacted Gubenko. Schurkman informed both Gubenko and Taylor of this fact. The government did not allege a conspiracy to bribe Gubenko between Schurkman and Taylor. Evidence of the bribe by Taylor was not at all relevant to prove

Taylor's involvement in a conspiracy because he was not on trial for bribery or conspiracy to bribe but was merely a witness for the government.

The evidence of a subsequent bribe did not, as the court instructed, illuminate the earlier conversations between Gubenko and Schurkman, which were self-evident. Rather, it was prejudicial to the issue of whether Schurkman was offering a bribe to Gubenko or whether it was Gubenko's overreaching and pressure which led to the discussion of money. Nor was the actual bribe a minor reference, it was a large portion of both the testimony of Gubenko and Taylor. The evidence, a clear violation of the rule against hearsay, was highly prejudicial. See United States v Kelly, 349 F2d 720, 758 (2nd Cir. 1965); United States v Birnbaum, 337 F2d 490 (2nd Cir. 1964).

POINT IV

THE COMBINATION OF ERRORS AT TRIAL WAS NOT HARMLESS.

The harmless error doctrine is to be applied with an eye toward balancing the defendant's right to a fair trial and the well-ordered functioning of the Federal Judicial System. Errors are not to be ignored if there is a reasonable possibility that they contributed to the conviction. Chapman v California, 386 U.S. 18, 87 S.Ct. 824 (1967). The Supreme Court in Chapman admonished against giving too much emphasis to "overwhelming evidence" of guilt stating that constitutional errors affecting the substantial rights of the aggrieved party are not to be considered harmless. Harrington v California, 395 U.S. 250, 89 S.Ct. 250.

The reviewing court must be satisfied the error was harmless beyond a reasonable doubt. Chapman v California, supra. A stricter test of harmless error must be used if constitutional rights are violated. United States v Steinkoenig, 487 F2d 225 (5th Cir. 1973).

The jury, faced with the powerful effect of Judge Conner's misstatement, also was influenced by the prejudicial remarks of Mr. Epstein at the close of his summation. The combined effect of Judge Conner's and Mr. Epstein's errors casts strong doubt on the validity

of the jury fact-finding function. See, United States v Freeman, 514 F2d 1314 (D.C. Cir. 1975).

These two errors were not harmless in the context of this trial. It was at the crucial meeting on February 5th, between Gubenko and Schurkman that the alleged bribe offer was made. It was at this meeting the terms and conditions of the alleged bribe were established. All subsequent events originated from this meeting. Whether Schurkman offered a bribe or whether Gubenko was overreaching in his approach or over-anxious to "trap" Schurkman was the ultimate issue for the jury.

There were only two witnesses to the event - Schurkman and Gubenko. The government claimed it had no tape of this session. Gubenko testified to his version of the events. Schurkman relying on his Fifth Amendment privilege did not testify. The Trial Judge's erroneous charge left the jury with the unmistakable impression that Schurkman's silence was an admission that Gubenko was telling the truth and that Schurkman did not testify because "obviously, if he were going to give testimony against himself he wouldn't testify."

Combined with the prosecutor's vilification of Schurkman, the judge's charge completely destroyed his chance of receiving a fair trial, denied him due

process of law owed to each defendant, emasculated the presumption of innocence and improperly shifted the burden of proof.

In this short trial, where no defense was presented, where the jury deliberated on a second day there is no guarantee that these errors did not reasonably contribute to the conviction."

C O N C L U S I O N

FOR THE REASONS STATED ABOVE THE APPELLANT ASKS THAT THE JUDGMENT OF CONVICTION BE VACATED AND THAT HE BE GIVEN A NEW TRIAL.

Dated: January 20, 1977

Respectfully submitted,

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0861 SCHURKMAN, JULIUS Case Filed Mo. 07 Day 15 76 0649 01

x 0208 01 NO. OF DEFTS 02

U.S. MAG. CASE NO. 76-303

OFFENSES CHARGED ORIGINAL COUNTS 1

18:201(b) Bribery of public official.

x

12:00p.m. 3/8/76

7-15-76

7-22-76

7-22-76 x

10-19-76 x

10-20-76

10-27-76

10-27-76 x

12-14-7 x

3/8/76
4/5/76 SS-080E

3/8/76 SS- 080E

18 USC 201 - BRIBING A REVENUE AGENT

x

Jeremy S. Epstein
791-0036

Jacob Lefkowitz
150 Bway
New York, NY

3/8/76	Complaint filed, represented by Jacob P. Lefkowitz, Eqz., 150 Broadway, N.Y. Defendant released on his own recognizance.
7/15/76	Indictment filed 76 Cr. 649
7-22-76	Def. [illegible] enter a plea of not guilty. Trial date set for 10-12-76 (Five days length of trial) Def. [illegible] assigned to Conner, J. ...Conner, J.
7-23-76	Filed the following papers received from Mag.Schreiber(Mag.#76-criminal complaint,SDNY,Disposition sheet and Notice of appearance of Jacob P.Lefkowitz,150 Broadway,NYC 10038 964-4845
7-23-76	Filed Notice of appearance of Atty. Jacob P.Lefkowitz,150 Bdway NYC 10038-964-4845
8-18-76	Filed Government's notice of readiness for trial.

— See over —

DATE	76Cr.649 Conner,J. Julius Schurkman
10-19-76	Filed Govts requests to charge.
10-19-76	Filed Govts proposed questions on voir dire
10-20-76	Deft. & Atty.Jacob Lef owitz,present...JURY TRIAL BEGUN.
10-21-76	Trial cont d. and adj d to 10-26-76..
10-26-76	Trial cont d.
10-27-76	Trial cont d & concluded. Jury verdict GUILTY in Count 1 as charged..P.S.I. ordered - Sentence adjd to 12-3-76 2:45 Deft cont d. on R.O.R..... CONNER,J....
11-26-76	Filed Govt's Requests to charge
11-27-76	Filed Deft's Resquest to charge.
12-14-76	Filed Transcript of record of proceedings dated: October 20,21,26,27, 1976.
12-14-76	Filed notice of appeal from judgment dated 12-14-76..Copy given U.S.Atty. and mailed to deft C/o atty.Lefkowitz....
12-14-76	Filed Judgment (Atty. Jacob Lefkowitz, present) The defendant is committed for imprisonment for a period of EIGHTEEN (18) MONTHS, pursuant to Title 18 U.S.C. §3651 on condition that the defendant be confined to a jail type institution for a period of THREE (3) MONTHS. The execution of the remainder of the sentence of imprisonment is suspended and the defendant is placed on probation for a period of FIFTEEN (15) MONTHS, subject to the standing probation order of this Court. Defendant's release on his own recognizance is continued, pending appeal. SPECIAL CONDITIONS OF PROBATION-Defendant may act as an accountant and prepare and file tax returns, but may not participate in any inquiry or audit which involves contact either in person, by telephone, or by mail with representatives of the Internal Revenue Service, or any other taxing authority. CONNER,J Entered on-12-14-76
	Issued commitment and copies.
12-27-76	Filed Notice that original record has been certified and transmitted to USCA 2nd Circuit this day.

UNITED STATES OF AMERICA

-v-

JULIUS SCHURKMAN and
JAMES TAYLOR,

Defendants.

INDICTMENT

76 Cr.

The Grand Jury charges:

In or about February, 1976, in the Southern District of New York, JULIUS SCHURKMAN, the defendant, unlawfully, wilfully, knowingly and corruptly did, directly and indirectly, offer and promise things of value, to wit, approximately $6,000.00, to a public official, to wit, Stewart Gubenko, a Revenue Agent of the United States Treasury Department, Internal Revenue Service, with intent to influence the performance of an official act of said public official, to wit, the audit and report of audit of the United States corporate tax return, Form 1120, of the JTR Trucking Corporation for the fiscal year ending March 31, 1974.

(Title 18, United States Code, Section 201(b))

SECOND COUNT

The Grand Jury further charges:

On or about the 3rd day of March, 1976, in the Southern District of New York, JAMES TAYLOR, the defendant, unlawfully, wilfully, knowingly and corruptly

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did, directly and indirectly, give, offer and promise things of value, to wit, $2,000.00, to a public official, to wit, Stewart Gubenko, a Revenue Agent of the United States Treasury Department, Internal Revenue Service, with intent to influence the performance of an official act of said public official, to wit, the audit and report of audit of the United States corporate tax return, Form 1120, of the JTR Trucking Corporation for the fiscal year ending March 31, 1974.

(Title 18, United States Code, Section 201(b))

FOREMAN

ROBERT B. FISKE, Jr.
United States Attorney

A-H 1

The defendant is presumed to be innocent until the government has proven him guilty beyond a reasonable doubt. That presumption of innocence existed when the indictment was brought, it existed throughout the trial, and it will continue during your deliberations in the jury room.

The defendant, having that presumption of innocence, does not have to prove anything. He is entitled to remain absolutely silent and to leave with the government its burden of proof beyond a reasonable doubt.

The defendant cannot be required to give evidence against himself. He is entitled to remain silent. The Constitution gives him that privilege. And the privilege would be worthless if because he chose to remain silent you could presume that he must be guilty or that he has something to hide.

He is entitled to remain silent. In this case he elected to do so. But you cannot take the fact that he elected to avail himself of that constitutional right as evidence against him.

You will have to determine whether the government has proven beyond a reasonable doubt each of the necessary elements of the charge that it makes.

I will explain to you in a moment what those

mrr8

your Honor customarily includes this but many judges state to the jury punishment is no concern of theirs.

THE COURT: I should have said that. That is not in one of your proposed charges. It was at the end of your list. I intended to do it and somehow overlooked it. Let me make a note of it.

Anything else?

MR. LEFKOWITZ: May I suggest, Judge, that in that context that he doesn't have to testify, in line with the request that I submitted to you, he doesn't have to call any witnesses or produce any evidence. That's all.

THE COURT: All right.

MR. LEFKOWITZ: Thank you very much.

(In open court; jury present)

THE COURT: I want to clarify a couple of points and add one additional point to my instructions.

In my charge I reminded you of the constitutional privilege which every defendant has not to give testimony against himself. That is the wording of the Fifth Amendment to the constitution. I don't mean to suggest that if the defendant did testify his testimony would be against himself.

Obviously, if he were going to give testimony

mdr9

against himself he wouldn't testify. He could just as well give testimony for himself, but he is not required to do that, and in referring to that privilege in the wording of the constitution I did not mean to suggest to you that if he had testified it would be against himself. As I told you, that privilege of remaining silent and of not testifying is a very important privilege and its value would be totally destroyed if you could assume that because a defendant had not chosen to testify or to call any other witnesses that he has no evidence he could adduce and that he must be guilty.

So don't attach any importance at all to the fact that in this case the defendant did not elect to take the stand or to call any other witnesses. He has that constitutional privilege and in this case he chose to avail himself of it as he was entitled to do.

Now, I also referred in discussing the testimony of Mr. Taylor that you could consider the fact he himself had pleaded guilty to bribery of Mr. Gubenko, and that he was awaiting sentence. I do not mean to suggest to you that a witness who has pleaded guilty and is awaiting sentence is not capable of telling a completely truthful strong or giving completely truthful testimony. It's entirely up to you to determine

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-v- : 76 Cr. 649

JULIUS SCHURKMAN, :

Defendant.

DEFENDANT'S REQUEST TO CHARGE

1. It is for you the jury to decide whether a participant in the crime who has pleaded guilty is telling the truth, or is perjurying himself in the hope of obtaining some concession from the government. United States v. Gonsales - Carta 491 F. 2d 548 (2nd Circuit 1969).

2. If you believe any witness has been impeached and thus discredited it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

3. The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. Holland v. United States 348 U.S. 121.

Respectfully submitted,

JACOB P. LEFKOWITZ
Attorney for Defendant
150 Broadway

United States of America vs.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

DEFENDANT: JULIUS SCHUERMAN

DOCKET NO.: 76 Crim. 649

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 12 DAY 14 YEAR 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jacob Lefkowitz, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, knowingly and corruptly did, directly and indirectly, offer and promise things of value, to wit, approximately $6,000, to a public official, to wit, Stewart Gubenko, an Internal Revenue Agent of the United States Treasury Department, Internal Service, with intent to influence the performance of an official act of said public official. (Title 18, United States Code, Section 201(b)).

Count 1.

SENTENCE OR PROBATION ORDER

Defendant is now before the Court and has had an opportunity to say anything he may say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

EIGHTEEN (18) MONTHS, pursuant to Title 18 U.S.C. § 3651 on condition that the defendant be confined to a jail type institution for a period of THREE (3) MONTHS. The execution of the remainder of the sentence of imprisonment is suspended and the defendant is placed on probation for a period of FIFTEEN (15) MONTHS, subject to the standing probation order of this Court.

Defendant's release on his own recognizance is continued, pending appeal.

SPECIAL CONDITIONS OF PROBATION

Defendant may act as an accountant and prepare and file tax returns, but may not participate in any inquiry or audit which involves contact either in person, by telephone, or by mail with representatives of the Internal Revenue Service, or any other taxing authority.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and Commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 12/14/76

FOR THE CLERK

( ) CLERK (X) DEPUTY

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

William C. Conner

Date 12/14/76

A-9 FILE

Rec'd two (2) Briefs 11/25/77

J. Mclamont

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